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No. 95-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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This biref of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage and produce 94 percent of its freight revenues. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-

fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. AAR's members expend substantial sums of money defending FELA claims and suits and in the payment of FELA settlements and verdicts,[2] far more than is spent by industry as a whole in payment of compensation to employees.[3]

This case is of particular interest to AAR because it has the potential to enlarge the scope of liability for railroads. Moreover, it dramatically espouses the possibility of forum shopping under FELA.

AAR's interest in this case, which involves the interpretation of an equipment statute, is heightened as a result of AAR's long involvement in railroad operational issues. AAR's expertise in this area has been recognized by Congress which, in originally enacting the Safety Appliance Act, named AAR's predecessor organization, the American Railway Association, to designate to the Inter-

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[2] For the past four years, AAR members have spent between $1.2 and 1.3 billion on FELA annually, or nearly 4 percent of their gross revenues. ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (Calendar years 1991, 1992, 1993, 1994) ("CLAIM & LITIGATION REPORT").

[3] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABLIITY 59 (1995), whereas railroads pay over $2.00. 1994 CLAIM & LITIGATION REPORT, at 2-2.

state Commerce Commission the standard height of drawbars on freight cars. Act of March 2, 1893, c. 196, § 5, 27 Stat. 531.[4] AAR has recently participated in two cases involving the question of whether the Safety Appliance Act is violated when the failure of a coupler to couple automatically is due to misalignment of a drawbar rather than a defect in the coupler—the same issue as is presented in the case at bar. *See, Reed v. Philadelphia, Bethlehem & New England Ry.*, 939 F.2d 128 (3d Cir. 1991); *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994).

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

ARGUMENT

THE INCORRECT INTERPRETATION OF THE SAFETY APPLIANCE ACT BY THE COURT BELOW HAS A SUBSTANTIAL POTENTIAL IMPACT ON RAILROAD LIABILITY

This case involves the applicability of Section 2 of the Safety Appliance Act (SAA).[5] The purpose of this statute is to assure that coupling devices on rail cars will function on contact so as to avoid the necessity for employees to go between moving cars to couple them man-

[4] More recently Congress has authorized the Secretary of Transportation to use AAR's services in carrying out his duties with regard to power and train brakes. 49 U.S.C. § 20302(e).

[5] Now codified at 49 U.S.C. § 20302(a), in pertinent part this provision reads:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) a vehicle only if it is equipped with—
>
> (A) couplers coupling automatically by impact, and capable of being uncoupled, without necessity of individuals going between the ends of vehicles;

ually. It was this dangerous activity that Congress sought to prevent when it enacted § 2 in 1893.[6]

Today, rail cars are all equipped with automatic couplers. However, even couplers that are in perfect working order will from time to time become misaligned due to the horizontal play of the drawbar required to permit the rounding of curves without derailment (Pet. brief at 3).[7]

The court below held that a railroad is liable as a matter of law under the SAA if an employee goes between rail cars and is injured while attempting to align a drawbar to allow for coupling of the cars even if there is no evidence of a defect in the couplers and the alleged failure to couple is due to misalignment of the drawbars. Given this ruling, the court prohibited the railroad defendant from introducing evidence of lack of defect in the coupler.

Petitioner's brief demonstrates a strong basis for review of the decision below by this Court: a split among the seven federal courts of appeals that have decided the issue, and a split between a state court and the federal court of appeals for the circuit in which the state court sits. Because of these developments, the risk that venue will dictate the outcome has risen to an unacceptable level in cases arising under a single federal law.

A. The Decision Below Expands The Scope Of Railroad Liability In FELA Cases Greatly

Under its unique provisions, FELA imposes liability on railroads for workplace injuries in cases where the railroads' negligence caused the injury. 45 U.S.C. § 51. However, unlike workers' compensation FELA does not

[6] 24 Cong. Rec. 1275 (1893).

[7] Federal Railroad Administration regulations recognize that couplers must contain sufficient lateral play to prevent "fouling on curves." 49 C.F.R. Part 215.125.

limit the amount of damages that may be collected when a railroad is liable.[8] Thus, a balance has been struck by FELA between limiting liability to cases where employer fault can be demonstrated while omitting any statutory limits on damages.[9]

The interpretation of safety statutes like the SAA plays an important role in FELA cases because a violation of such a statute constitutes negligence *per se*. *Urie v. Thompson*. 337 U.S. 163, 189 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384, 390 (1949). As a result, if there is a finding that a safety statute has been violated, the railroad may not introduce evidence that it used reasonable care in its operations. Moreover, the railroad may not introduce evidence that the employee's negligence contributed to the injury, which ordinarily would serve to reduce any judgment in proportion to the contributory negligence. 45 U.S.C. § 53. Therefore, a determination that the SAA was violated has a direct impact on a railroad's obligation to respond in damages to an injured employee and the amount of those damages.

By ignoring the majority of federal court decisions and finding the SAA applicable in cases where there was no defect in the coupling device, the court below has expanded the notion of strict liability under FELA and

[8] In order to create an incentive to return to work, workers' compensation programs commonly cap the amount of weekly benefits that can be received by an injured employee. U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Chart VI (1994).

[9] A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National RR Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive). There were 79 FELA verdicts of $1 million or more against AAR members from 1990 through 1994. 1994 CLAIM & LITIGATION REPORT at 2-8.

shifted the balance in FELA prescribed by Congress.[10] In so doing, the court in essence made a public policy decision. While the wisdom of keeping one industry subject to a system under which an injured employee's right to compensation is conditioned on a showing of fault may be debated,[11] it is for Congress rather than the courts to decide to what extent railroads should be strictly liable for the injuries of their employees.[12]

B. Failure To Resolve This Issue Will Permit Substantial Federal Rights Of Railroad FELA Defendants To Be Determined By The Plaintiff's Choice Of Forum

The split between the circuits on this issue, and particularly between federal and state courts, creates a situation where the substantive rights of the parties may be determined by the choice of venue. This is contrary to Congressional intent under FELA, which is that the law with respect to employee compensation in the railroad industry be uniform. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1952).

Under FELA, state courts have concurrent jurisdiction to hear claims. 45 U.S.C. § 56. As between state and federal court, the plaintiff has an absolute choice of forum, as FELA cases may not be removed. 28 U.S.C. § 1445(a). Thus, even if the accident occurs in one of the eighteen

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[10] As this Court recently reaffirmed, "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis for his liability is his negligence, not the fact that injuries occur." *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, at 2404 (1994).

[11] *See*, Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79 (Winter 1992).

[12] This Court has questioned the wisdom of FELA but has recognized that it is within Congress' province to make any change. *See e.g., Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943); *Urie v. Thompson*, 337 U.S. at 196 (Frankfurter, J. concurring in part).

states[13] within the five federal circuits that have ruled there is no violation of the SAA when failure to couple is due to a misaligned drawbar, a plaintiff wishing to avoid that ruling may be able to do so by filing suit in state court. The potential for abuse is increased because FELA plaintiffs have wide latitude over the state in which to bring a suit.[14]

As this case makes clear, the state court hearing the claim may well decline to follow the precedent of the circuit in which it sits. As a result, in many parts of the country the same facts will lead to differing results. In state court, when misalignment of a nondefective drawbar is alleged, an employee would be relieved of the obligation to show any negligent conduct on the part of the railroad, while the railroad will be precluded from offering evidence of the employee's negligence. In the federal court, however, railroad negligence would need to be proved and the comparative negligence defense would remain available. This is untenable when the same federal statute is involved. It is contrary to the purpose of FELA to permit such disparate results to hinge on one party's selection of the forum.

The ruling below invites FELA plaintiffs to make an end run around the negligence requirement of FELA. Unless this Court decides this issue definitively, state courts will have the ability to impose strict liability on railroads in factual situations similar to the case at bar despite the weight of federal precedent to the contrary, thereby encouraging forum shopping. The court below acknowledged as much, suggesting that, absent resolution of this issue by this Court, the court below will continue to follow

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[13] Approximately 49 per cent of rail employees reside in those eighteen states. ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS 57 (1994 ed.) ("RAILROAD FACTS").

[14] A plaintiff may bring a FELA suit "wherever the railroad shall be doing business." 45 U.S.C. § 56.

state precedent. There are hundreds of thousands of rail cars in operation on the rail network daily.[15] In as much as nondefective drawbars will not infrequently become misaligned in the course of normal operations, there will be numerous potential opportunities for unwarranted expansion of railroad liability through forum shopping.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Appellate Court of Illinois in this case be granted.

Respectfully submitted,

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[15] In 1993, there were 1,173,132 freight rail cars in service. RAILROAD FACTS at 50.